BLANK PAGE

FILE COPY

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF ~~IN OPPOSITION TO WRIT OF CERTIORARI~~

DONALD HORNE
70 Pine Street
New York, N. Y.
Attorney for Respondent

ALEXANDER LEVENE
of Counsel

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

BLANK PAGE

INDEX.

CITATIONS.

CASES CITED:

CASES CITED (continued):

CASES DISTINGUISHED AND DISCUSSED:

STATUTES:

STATUTES (continued):

STATUTES (continued):

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 853

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI.

Opinions Below.

The first opinion of the District Court (R. 25-26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27-33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34-37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41-46) is reported in 117 F. (2d) 133.

Statement of the Case.

This is a suit brought to recover the amount of an overpayment of tax for the year 1920 (R. 4).

The respondent is a Pennsylvania corporation (R. 3) and was engaged in the business of manufacturing shoes (R. 12).

On March 15, 1921, the respondent filed its tax return for the calendar year 1920 (R. 3) and reported a tax liability of $52,481.97 which it paid in four installments on March 14, 1921; June 14, 1921; September 14, 1921, and November 13, 1921 (R. 3-4).

Prior to June 15, 1926, respondent filed a waiver of its right to have its taxes for the taxable year 1920 determined and assessed within five years after its return was filed (R. 4).

On April 10, 1926, the Commissioner of Internal Revenue advised respondent, by registered mail, of a deficiency for the year 1920 of $1,362.50 (R. 4).

In July 1926 said deficiency of $1,362.50 was assessed (R. 4).

On July 28, 1926 respondent paid said additional tax of $1,362.50 for the year 1920 (R. 4).

On or about March 23, 1929, and less than four years after the final portion of its tax for the year 1920 was paid, respondent filed a claim for refund for its entire tax for that year amounting to $53,844.47 (R. 4).

On September 9, 1929, the Commissioner signed a schedule of overassessment, and in October, 1929, he issued to respondent a certificate of overassessment which read in part as follows (R. 4, 11, 19-24, 26):

Tax assessed:

Original Account #422,472	$52,481.97
Additional July 1929, Page 1, Line 5 #2	1,362.50
Total assessment	53,844.47
Correct tax liability	39,010.79
Overassessment	14,833.68
Barred by Statute of Limitations	13,471.18
Overassessment allowable	1,362.50

Thereafter respondent received a refund of the sum of $1,362.50 and interest thereon (R. 4), but did not receive a refund of the balance of $13,471.18 of the overassessment (R. 4).

On March 7, 1932 respondent commenced this suit in the District Court for the Middle District of Pennsylvania for the recovery of said overpayment of tax of $13,471.18 for the year 1920 (R. 3).

The collectors of internal revenue by whom said tax was collected were not in office when this suit was commenced (R. 4).

Summary of the Argument.

This is a suit, brought in the District Court for the Middle District of Pennsylvania, for the recovery of an internal-revenue tax for the year 1920, erroneously collected.

Respondent's return for the year 1920 was filed March 15, 1921, and the tax reported thereon was paid during 1921. Prior to June 15, 1926 respondent filed a waiver extending the Commissioner's time to assess an additional tax.

On July 28, 1926 respondent paid an additional tax for the year 1920, and on March 23, 1929 respondent filed a claim for refund of its entire 1920 tax.

The Commissioner found an overpayment of $14,833.68 and issued his certificate of overassessment in said amount, but refunded only the sum of $1,362.50 paid on July 28, 1926 and refused to refund the balance of $13,471.18, paid in 1921, claiming that it was barred by the statute of limitations.

(1) Respondent contends that the Commissioner erred in stating that part of the refund was barred. That under Sec. 284(g) of the Revenue Act of 1926, the entire amount

of the 1920 tax was refundable under a claim filed within four years after the final payment was made, because respondent had filed a waiver prior to June 15, 1926. Sec. 284(g) provides that, in such case, the refund shall be made if the claim is "filed either on or before April 1, 1927 or within four years from the time the tax was paid."

Respondent contends that the tax was a single, unitary liability which was not paid until the final portion thereof was paid in 1926, and that the claim for refund, filed less than four years after said final payment, attached to the entire tax, irrespective of the dates of payment of prior portions thereof. Petitioner concedes that this would be true if the claim had been filed on or before April 1, 1927, but declines to give equal weight to the other co-ordinate phrase "or within four years from the time the tax was paid," and contends that the latter phrase is restricted by Sec. 284(b)(2) so that claims filed pursuant to the provisions of Sec. 284(g), within four years after the tax is paid, can only sustain a refund of the portions of the tax paid within four years prior to the filing of the claim, while claims filed on or before April 1, 1927 are not subject to such restriction. Respondent replies that Sec. 284(b) expressly excepts Sec. 284(g) from its restrictions, and there is no justification for according different weights to the two co-ordinate branches of the alternative phrase.

(2) Respondent further contends that this suit was timely commenced six years after the certificate of overassessment was issued by the Commissioner. Respondent relies upon the rule laid down by this Court in the case of *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, and the cases therein cited, to the effect that the issuance of the certificate of overassessment constituted an allowance of the claim for refund, which raised an implied promise on the part of the United States to pay any amount that might

actually be due the claimant, and that this promise constituted a new cause of action under the applicable internal revenue Act.

(3) Respondent also contends that this new cause of action was basically for the recovery of an internal revenue tax erroneously collected, within the meaning of the statute prescribing the jurisdiction of the district courts. The collectors of internal revenue by whom said tax was collected were not in office when this suit was commenced, hence the District Court had jurisdiction of this suit under U. S. C. Title 28, Sec. 41, par. 20. Respondent also contends that all decisions which hold that the district courts do not have jurisdiction of a suit of this type are in error, because they go on the theory that a suit in the district courts, against the United States, cannot be maintained for more than $10,000, unless it is a suit that could have been brought against the collector personally. They err in that they try to find a concurrence of jurisdiction within the district courts in suits against the United States and personal suits against collectors. This was not the intent of Congress in granting, to the district courts, jurisdiction of suits against the United States, because Congress expressly provided that such jurisdiction must be concurrent with the Court of Claims, and that Court has no jurisdiction of suits against collectors of internal revenue.

ARGUMENT.

I.

Sec. 284(g) of the Revenue Act of 1926 permitted the recovery of the tax paid in 1921 because the claim for refund was filed less than four years after the payment of the final portion of the tax.

Sec. 284(g) of the Revenue Act of 1926 relates to that special and limited class of cases, such as our case, involving refunds of income, war-profits, or excess-profits taxes for the years 1917 to 1921 only, in which the taxpayer filed a waiver extending the time for the determination and assessment of his taxes. The language of said section, to the extent that it is pertinent to our case, is as follows:

> "(g) * * * If the taxpayer has, on or before June 15, 1926 filed such a waiver in respect of the taxes due for the taxable year 1920 * * * then such * * * refund relating to the taxes for such taxable year 1920 * * * shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *".

The respondent filed a waiver prior to June 15, 1926 in respect of its taxes for the taxable year 1920, and paid its tax for that year on July 29, 1926, and filed a claim for refund thereof on March 23, 1929 or within four years from the time the tax was paid.

It is well settled that the date on which a tax is considered paid is the date on which the final portion of the tax is paid. The tax is not paid while any portion of it is still open. The tax is a single, unitary, indivisible liability which is paid only when the final payment is made and the obligation is discharged.

The Court of Claims, in the case of *Hills* v. *United States*, 50 F. (2d) 302, interpreted the similar provision of Sec. 3228 R. S. to the effect that a claim for refund of tax must be filed "*within four years next after payment of such tax,*" and held that the tax shall be deemed paid on the date upon which the final payment of the tax is made, and that the tax paid at that time is the entire tax and not a portion thereof.

The Court of Claims has followed this rule in the cases of *Haebler* v. *United States*, 8 F. Supp. 855, and *Safe Dep. & Trust Co.* v. *United States*, 9 F. Supp. 606.

The district courts have also followed this rule in *Safe Dep. & Trust Co.* v. *Tait*, 8 F. Supp. 634; *Union Trust Co.* v. *United States*, 5 F. Supp. 259; *Clarke* v. *United States*, 5 F. Supp. 292, and *Magoon* v. *United States*, 333 C. C. H. par. 9294.

The circuit courts of appeals have likewise followed the rule of the *Hills* case in *Clarke* v. *United States*, 69 F. (2d) 748; *Union Trust Co.* v. *United States*, 70 F. (2d) 629; and *Magoon* v. *United States*, 77 F. (2d) 804.

In *Union Trust Co.* v. *United States*, 70 F. (2d) 629, the Circuit Court of Appeals for the Second Circuit said, at page 630:

> "the tax liability is unitary and was not discharged until paid in full."

In our case the claim for refund was filed within four years from the time the final payment of the tax was made, and the Court below was therefore right in applying the rule of the *Hills* case, and in saying:

> "By 'the tax', the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. Hills v. United States, 50 F. 2d 302, 305-307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001;" (R. 45)

The District Court, in our case, was likewise right when it said:

> "The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitation, is the date upon which the final payment was made, and the words 'the tax' refer to the entire tax and not a portion thereof. Hills v. U. S., 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001;" (R. 36).

The petitioner, at the bottom of page 29 and the top of page 30 and pages 32, 34 and 37 of its brief herein, concedes that, having filed a waiver prior to June 15, 1926, the respondent, at any time prior to April 1, 1927, could have filed a claim for refund of the portion of its tax paid in 1921, but contends that the respondent cannot recover that 1921 payment where the timeliness of the claim depends on the clause "or within four years from the time the tax was paid."

This attempted distinction is based upon the decision of the Court of Claims in the case of *Weinburg* v. *United States,* 25 F. Supp. 83, which is in conflict with the decision of the Court below. The Court of Claims, in the *Weinburg* case, held that the entire tax for the year 1917 could have been refunded, under Sec. 284(g) of the Revenue Act of 1926, if the claim for refund had been filed prior to April 1, 1925 (the equivalent date for 1920 taxes, in our case, is April 1, 1927). The Court of Claims said:

> "If he [the plaintiff] had filed his claim on or before April 1, 1925, he could have secured the refund of the entire overpayment, notwithstanding part of it was paid more than four years prior to that date."

The Court of Claims therefore ruled that, to this extent, Sec. 284(g) was excepted from the provisions of Sec. 284(b)(2) which restricted general refunds to the portion

of the tax paid during the four years immediately preceding the filing of the claim for refund.

The petitioner herein and the Court of Claims, in the *Weinburg* case, however, claim that the other branch of the alternative contained in Sec. 284(g), to the effect that the claim for refund may be filed "within four years from the time the tax was paid", was not excepted from the provisions of Sec. 284(b)(2).

The confusion on the part of the petitioner and the Court of Claims is caused by their failure properly to read the alternative provisions of Sec. 284(g) governing the filing of claims for refund. This alternative reads as follows:

> "* * * if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

An examination of the definitions of the words used in this alternative phrase will make it apparent that the taxpayer must have the same rights under the second branch of the alternative as he has under the first branch.

Webster's New International Dictionary, Second Edition, Unabridged, gives the following definitions:

> "either, *conj.* * * *;—used before two or more co-ordinate words, phrases, or clauses which are joined by *or;*"
>
> "or, *conj.* A co-ordinating particle that marks an alternative; * * *
>
> "co-ordinate, *adj.* Equal in, or in the same, rank or order; not subordinate; * * *."

It is therefore obvious that the two branches of the alternative phrase, being preceded by the word "either" and joined by the word "or," are of equal rank and neither of them is subordinate to the other.

The Court below upheld this interpretation of this alternative phrase, and said:

> "No plausible reason is advanced why a claim for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two co-ordinate clauses be treated as superior to the other" (R. 46).

The District Court ruled to the same effect and said:

> "Subdivision (g) provides that claim may be made *either* on or before April 1, 1927, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.
>
> "Furthermore, if the provision 'or within four years from the time the tax was paid,' were construed as in the Weinburg case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction" (R. 37).

We might add that such a result should likewise be avoided under the ordinary rules of English grammar.

The independence of these two co-ordinate alternatives will be more clearly understood if it is borne in mind that the phrase containing the date April 1, 1927 is a reenactment and enlargement of the original provision of Sec. 252, of the Revenue Act of 1921 which provided that a claim for refund may be filed before the expiration of five years *from the date when the return was due,* and that the phrase "four years from the time the tax was paid," is a reenactment of the provision of Sec. 3228 R. S. permitting a claim to be filed within four years next *after payment of the tax.* These two provisions were always independent and co-ordinate.

Legislative History of Sec. 284(g).

The above statement is readily supported by an examination of the legislative history of this section.

In January 1923, the filing of a claim for refund was governed by Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 53) and by Sec. 3228 R. S. as amended by the Revenue Act of 1921 (Appendix, *infra*, p. 53). Sec. 252 of the Revenue Act of 1921 provided that a claim for refund must be filed before the expiration of *five years from the date when the return was due*, and Sec. 3228 R. S. contained the alternative provision that claims for refund must be filed *within four years next after payment of the tax*. (This latter provision is the one which was interpreted by the Court of Claims in the case of *Hills* v. *United States, supra.*) Hence at that time a claim for refund of income taxes could have been filed in the alternative, *either* five years after the return was due, *or* four years after the tax was paid.

The Commissioner had followed the practice of taking waivers from taxpayers to extend his time for making additional assessments, but it was doubtful whether these waivers were legally effective to extend the taxpayer's time to file a claim for refund. A taxpayer might sign a waiver extending the time for additional assessment, but if the final audit showed an overpayment of tax, the taxpayer might have no right to claim the refund.

To overcome this inequity, Congress on March 4, 1923, passed a special Act amending Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 55). This amendment inserted a clause in Sec. 252 to the effect that if a taxpayer had filed a waiver on his 1917 taxes, a claim for refund could be filed by him either *within six years after the return was due, or within two years after the tax was paid.*

This Act, therefore, enlarged the period after the return was due from five years to six years to correspond with the extension, by waiver, of the Commissioner's time to make

additional assessments, but preserved the right of the taxpayer to file a claim within a given period after the tax was paid.

While the above Act of March 4, 1923 was still pending as a Bill in Congress, the Secretary of the Treasury wrote a letter, dated January 23, 1923, to the Acting Chairman of the Committee on Ways and Means of the House of Representatives, in which he approved the proposed amendment. In this letter the Secretary referred to the then practice of his Department in the following words:

> "The present ruling of the Treasury Department is * * * that a refund * * * may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due."—Report of House Committee on Ways and Means—Internal Revenue Cumulative Bulletin, 1939—1 (Part 2), p. 849.

The Secretary, in a later portion of the same letter said as follows:

> "* * * consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due."—Same Report, p. 850.

After the enactment of this Act of March 4, 1923, the Commissioner of Internal Revenue issued a Treasury Decision explaining said Act, and said:

> "Until March 4, 1923, a claim for refund * * * could be allowed after five years from the date when the return was due, even though such claim was not filed by the taxpayer until after the expiration of the five years, if such claim was presented to the Commissioner of Internal Revenue within four years next after payment of the tax."—Treasury Decision 3462, II-1 Cumulative Bulletin, p. 180.

The Commissioner, in this Decision, then proceeded with an explanation of the Act of March 4, 1923, and stated that under it a claim could be filed by a taxpayer in the alternative—either six years after the return was due or two years after the tax was paid.

From the above it is obvious that the Secretary of the Treasury and the Commissioner of Internal Revenue recognized that it was the intent of Congress to permit a claim for refund to be filed within a given period after the tax was paid, even though that be after the expiration of the fixed period after the return was due.

In 1924 the same situation arose with regard to taxes for 1918, and Congress passed the Act of March 13, 1924 (Appendix, *infra*, p. 55), further amending Sec. 252 of the Revenue Act of 1921, to grant a similar extension with respect to taxes for the year 1918, and an additional year for 1917 taxes.

The filing date of all 1918 returns had been extended by the Commissioner from March 15, 1919 to June 15, 1919. The Act of March 13, 1924 therefore fixed the time limit for the filing of 1918 waivers at June 15, 1924 or five years after the returns were due to be filed. The filing date of all 1917 returns had been extended by the Commissioner from March 15, 1918 to April 1, 1918, hence the Act of March 13, 1924 set April 1, 1925 as the fixed date for the expiration of the seven year period after the 1917 returns were due and of the six year period after the 1918 returns were due.

Thereafter in all subsequent amendments of this provision, the date of April 1st of an appropriate year was used to designate the lapse of time after the return was due, and this date of April 1st therefore relates to the enlarged number of years after the due date of the return as distinguished from the period of years after the payment of the tax.

The provisions of Sec. 252 of the Revenue Act of 1921, as amended by the above two Acts, were carried forward

into Sec. 281 of the Revenue Act of 1924 (Appendix, *infra*, p. 56). The 1923 and 1924 amendments became Sec. 281(e) of the Revenue Act of 1924, practically without change, except that the period of two years after the tax was paid, was changed to four years to conform to the period of time allowed in Sec. 3228 R. S.

Prior to the Revenue Act of 1924 there had been no restriction upon the portions of the tax that could be recovered under a claim for refund. If the claim was filed within the statutory period after the payment of the final portion of the tax, it could reach the entire tax irrespective of the dates of payment of prior installments.

Sec. 281(b)(2) of the Revenue Act of 1924, for the first time placed a restriction upon refunds, by limiting general refunds to the portions of the tax paid during the four years immediately preceding the filing of the claim. Sec. 281(b), however, expressly excepted from its provisions the class of cases covered by subdivision (e). Congress took this means of preserving the rights of taxpayers who had filed waivers. Sec. 281(b)(2) of the Revenue Act of 1924, subsequently became Sec. 284(b)(2) of the Revenue Act of 1926, and Sec. 281(e) of the Revenue Act of 1924 subsequently became Sec. 284(g) of the Revenue Act of 1926.

In spite of the clear language of Sec. 284(b) which expressly excepts Sec. 284(g) from its provisions (Appendix, *infra*, p. 59), and in spite of the admission contained on page 37 of petitioner's brief herein, that "Section 284(g) does create a different rule with respect to claims filed prior to April 1, 1927," the petitioner herein, as did the Court of Claims, in the *Weinburg* case, claims that the second branch of the alternative contained in Sec. 284(g) of the Revenue Act of 1926 is restricted and qualified by Sec. 284(b)(2) of that Act.

The Court of Claims attempted to support its erroneous ruling by relying upon one sentence from a paragraph of a report of the Senate Committee on Finance concerning the

Revenue Act of 1924. This paragraph relates solely to Sec. 281(b) of the Revenue Act of 1924, and reads as follows:

> "Section 281(b): The limitation on credits and refunds contained in the first proviso of section 252 of the existing law was changed in the House bill in two principal respects. The date from which the period of limitation runs was changed from the due date of the return to the date of the payment of the tax. Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues. Again the complicated provisions of the present section with reference to the length of the periods of limitation, which vary from two years from the time the tax was paid to six years from the time the return was due, were simplified by fixing the period at four years. In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years immediately preceding the filing of the claim."—Report of Senate Committee on Finance—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 289.

The Court of Claims, in the *Weinburg* case, extracted out of its context, the last sentence of the above quoted paragraph, as though it applies to Sec. 281(e) whereas it only applies to general claims for refund filed pursuant to Sec. 281(b) and not to the special and limited class of cases covered by Sec. 281(e), which were expresly excepted from the provisions of Sec. 281(b). The petitioner, on page 34 of its brief herein, commits the same error. The Court of Claims also overlooked the very next paragraph of the same report, which relates to Sec. 281(e) and contains no such restriction. This paragraph reads as follows:

> "Section 281(e): This subdivision has been inserted by the committee, to provide that if the taxpayer has

(1) within five years from the time his return for 1917 was due, filed a waiver of his rights to have the taxes due for that year determined and assessed within five years after his return was filed, or if he has (2) filed such a waiver on or before June 15, 1924, in respect of the taxes due for 1918, a credit or refund may be allowed if claim therefor is filed on or before April 1, 1925, or within four years after the tax was paid. Corresponding provisions are contained in an Act approved March 13, 1924."—Same report, p. 289.

The District Court, in its second opinion was justified in stating that the final sentence of the first above quoted paragraph relating to Sec. 281(b) dealt with a different statute and was not directed to the particular provision here involved (R. 36). The District Court meant, of course, that Sec. 284(b) and Sec. 284(g) were different statutes or enactments. The District Court did not mean (as petitioner implies on page 37 of its brief herein) that the above quoted report related to the Revenue Act of 1924 and therefore did not apply to the Revenue Act of 1926.

The Court below was likewise right, when it said in its opinion on the second appeal, that the scope and intendment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b) and that the two are wholly unrelated provisions of the statute (R. 46).

Whether (b) and (g) be called subdivisions, subsections, unrelated provisions, or separate statutes, the fact remains that they are separate entities and are mutually exclusive. The independence of separately lettered subdivisions has been recognized by Congress. The Committee on Ways and Means of the House of Representatives once said:

"* * * it was deemed advisable to subdivide section 252, as amended by this bill, into paragraphs (a), (b), (c), and (d) in order to avoid confusion in the administration of the same and to clarify the fact that each section is a separate entity."—Report of Committee

on Ways and Means of House of Representatives—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 850.

The case of *United States* v. *Resler*, No. 616, present Term of this Court, decided April 14, 1941, and cited on page 37 of the petitioner's brief, does not support the petitioner's contention that Sec. 284(g) is qualified by Sec. 284(b) (2). In that case, this Court ruled on Sec. 212(b) of the Motor Carrier Act of 1935, which contains the preamble "Except as provided in section 213". This Court did not hold that Sec. 212(b) qualified Sec. 213. On the contrary, this Court held that "The phrase 'Except as provided in Sec. 213' was intended to remove from the sweep of Sec. 212(b) only those transfers which were within the compass of Sec. 213." Applying this rule to our case, the phrase contained in Sec. 284(b) of the Revenue Act of 1926 "Except as provided in subdivisions (c), (d), (e) and (g) of this section" removed from the sweep of Sec. 284(b) those cases which were within the compass of Sec. 284(g). Hence the sweep of the restriction contained in Sec. 284(b) (2) does not apply to any claims for refund filed within the compass of Sec. 284(g).

The petitioner, in footnote 6 on page 33 of its brief herein points out that Sec. 281(e) of the Revenue Act of 1924, hence also Sec. 284 (g) of the Revenue Act of 1926, originated in Sec. 252 of the Revenue Act of 1921, as amended, and was therefore in the statute before Sec. 281(b) (2) appeared. This statement is followed by the illogical conclusion that Sec. 281(e) was not intended to limit Sec. 281(b) (2). Sec. 281(e) does not limit Sec. 281 (b) (2) but is specifically excepted from the provisions of Sec. 281 (b) (2). The logical conclusion from petitioner's premises that Sec. 281(e) was the older enactment, and was reenacted and expressly excepted from the provisions of Sec. 281(b) (2), is that Sec. 281(b) (2) was not intended to limit Sec. 281(e).

Sec. 281(e) of the Revenue Act of 1924 was later amended by Act of March 3, 1925 (Appendix, *infra*, p. 57). This amendment extended this section to include taxes for the year 1919, and granted further time if the waiver filed by the taxpayer was extended.

Sec. 284 of the Revenue Act of 1926 (Appendix, *infra*, p. 58) carried forward the provisions of Sec. 281 of the Revenue Act of 1924, and Sec. 284(g) reenacted the previous Sec. 281(e) and extended this provision to cover the taxable years 1920 and 1921.

At this point reference might be made to the extract from the report of the Senate Committee on Finance on the Revenue Bill of 1926, quoted on page 35 of petitioner's brief. Petitioner states that the quoted paragraph shows a Congressional intent to give the taxpayer only until April 1, 1927 to file a claim if he had filed a waiver. The attention of the Court is respectfully called to the final clause of the quoted paragraph, which reads "if claim is filed before April 1, 1927, or within four years from the date the tax was paid".

The above chain of enactments was clearly made by Congress for the purpose of preserving the rights of taxpayers who had filed waivers. These taxpayers always had the right and Congress intended that they retain the right to file a claim for refund either within a fixed period after the due date of the return, which was set as April 1st of an appropriate year, or within the alternative given period after the payment of the tax, even though the second period of time extended beyond the expiration of the first. These two alternatives were always coordinate and independent.

The petitioner concedes that a claim herein filed prior to April 1, 1927 pursuant to the provisions of Sec. 284(g), could reach the entire 1920 tax, and would not be restricted by Sec. 284(b) (2). It is equally true that the claim herein filed pursuant to the provisions of Sec. 284(g), prior to

four years after the tax was paid, is likewise not restricted by Sec. 284(b) (2). As stated by the Court below, no plausible reason is advanced to the contrary (R. 46).

Applicability of the *Hills* Case.

The petitioner, on pages 37 to 40 of its brief herein, argues that the *Hills* case, and the other cases cited by respondent, do not apply to an income tax case because they all related to estate taxes. The same argument was urged by petitioner in the Court below.

The Court of Claims in the *Hills* case did state that a different rule would apply in refunds of income taxes because Sec. 281(b)(2) restricted them to the portions paid during the preceding four years. But that court spoke of the general claims for refund filed pursuant to the provisions of Sec. 281(b) and not to the special and excepted class of claims for refund filed pursuant to the provisions of Sec. 281(e).

Petitioner also points out that the *Hills* case adjudicated the provisions of Sec. 3228 R. S. and leaves the implication that the other cases, cited by respondent, also came under that section. But they did not. The case of *Clarke* v. *United States,* 69 F. (2d) 748 (C. C. A. 3d) involved the interpretation of Sec. 319(b) of the Revenue Act of 1926 which reads as follows:

> "(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously assessed or collected must be presented to the Commissioner within three years next after the payment of the tax."

Sec. 284(g) of the Revenue Act of 1926 is as much a separate entity from Sec. 284(b) of that Act, as is Sec. 319(b) of the same Act.

In fact the Government, in the case of *Clarke* v. *United States, supra,* argued that Sec. 284(b)(2) restricted the

amount of the refund recoverable under Sec. 319(b), but the Court refused to agree with that contention.

The only difference between the sections, adjudicated in the cases cited by respondent, and Sec. 284(g) is that in those sections the language used is *"years next after the payment of the tax"* while in Sec. 284(g) the language used is *"years from the time the tax was paid."* It is respectfully submitted that there is no legal difference between these two expressions.

The petitioner concludes its brief by conceding, on page 40, that it is not necessary to attack the *Hills* decision, and, in this, the respondent agrees because the *Hills* decision is sound law, and has been uniformly followed.

II.

This Suit was Timely Commenced Within Six Years After the Claim Was Allowed.

The timeliness of this suit has been settled by this Court in the case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258.

This court at the beginning of its decision in the *Bonwit Teller* case said that the "action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919." Aside from the question of whether a certain letter written by the taxpayer to the Commissioner was the equivalent of a claim for refund, which was resolved in favor of the taxpayer, the pertinent facts were as follows:

On July 14, 1919 the taxpayer paid half of its taxes for the fiscal year ended January 31, 1919, and on December 13, 1919 it paid the remaining half.

On May 16, 1925 the Commissioner wrote to the taxpayer that he had found an overpayment of $10,866.43 for the year ended January 31, 1919, which could not be re-

funded unless the taxpayer filed a waiver before June 15, 1925 in accordance with Sec. 281(e) of the Revenue Act of 1924 as amended by the Act of March 3, 1925.

On May 23, 1925, and hence prior to June 15, 1925, the taxpayer filed the waiver.

On May 12, 1927 the Commissioner caused to be delivered to the taxpayer a certificate of overassessment showing the overassessment of $10,866.43 and also showing that of this amount the sum of $9,846.43 had been credited against an unpaid tax of that amount for the year ended January 31, 1917 and enclosing a check for $1,462.99 for the balance of the overassessment with interest.

The taxpayer claimed that the sum of $9,846.06 had been improperly withheld because it had been credited to the 1917 tax, collection of which had been barred by the statute of limitations.

More than two years after the issuance of the above certificate of overassessment and much more than five years after the year 1919 when the tax had been paid, the taxpayer commenced suit in the Court of Claims to recover the refund for the fiscal year ended January 31, 1919.

The Government contended that under Sec. 3226 R. S. (Appendix, *infra*, p. 60) the suit was brought too late, because it had not been brought within five years after the date of the payment of the tax, nor within two years after the disallowance of the claim for refund. This is exactly the same contention as is raised by petitioner in our case.

This Court, in the *Bonwit Teller* case, overruled that contention of the Government and held that the claim had not been disallowed but had been allowed, and that the cause of action arose on May 12, 1927 upon the issuance of the certificate of overassessment. This Court held that the case was not affected by either the special limitation of five years after the payment of tax, or the special limitation of two years after a disallowance of the claim, and that therefore the only limitation that applied to the case was the

general limitation of six years after the cause of action arose, to wit; six years after the date of the issuance of the certificate of overassessment. At page 265 of that decision this Court said:

> "The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by Rev. Stat. Sec. 3226, as amended. U. S. C. title 26, Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225. There is no merit in the contention that the suit is barred."

The *Bonwit Teller* case in holding that "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought", reiterated a time-honored rule of law. As can be seen from the above quoted paragraph of the decision in that case, this Court supported that rule of law by citing *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Real Estate Savings Bank*, 104 U. S. 728; and *Bank of Greencastle's Case*, 15 Ct. Cl. 225.

The *Kaufman* case was decided by this Court in 1877. The revenue law, at that time, provided that a brewer should pay a tax of $100., if he made more than 500 barrels of beer per year, and $50. if he made a smaller quantity. The regulations promulgated by the Commissioner of Internal Revenue, provided that a claim for refund might be filed, if the brewer found at the end of the year that he had made less than 500 barrels of beer. The plaintiff had paid the tax of $100. and applied for a refund of $50. The claim was allowed by the Commissioner, but the Treasury refused to pay the refund. Suit was commenced in the Court of Claims.

The Government defended on the ground that the Court of Claims had no jurisdiction.

This Court in the *Kaufman* case upheld the jurisdiction of the Court of Claims, upon the ground that said Court, had jurisdiction of "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." This Court, in that decision, at pages 569 and 570 said:

> "It would seem to be clear * * * that the allowance of a claim by the Commissioner of Internal Revenue, under the authority of these statutes and regulations, raised an implied promise on the part of the United States to pay any amount that might actually be due the claimant under such circumstances, and certainly such a claim would be 'founded upon a law of Congress' ".
>
> * * * * *
>
> "To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake."

The *Real Estate Savings Bank* case was decided by this Court in the year 1881. That case also involved a suit in the Court of Claims for the refund of an overpayment of

tax, found by the Commissioner to be due, but payment of which was refused by the Treasury. This Court, in the *Real Estate Savings Bank* case, at page 733, citing the *Kaufman* case, said:

> "And we held that the allowance of a claim by the commissioner under this section was equivalent to an account stated between private parties, and binding on the United States, until in some appropriate form it is impeached for fraud or mistake, and that, if not paid on proper application through the accounting officers of the Treasury Department, an action might be maintained on it in the Court of Claims, because it raised an implied promise on the part of the United States to pay what might actually be due the claimant, and also because the claim therefor was founded on a law of Congress within the meaning of that term as used in defining the jurisdiction of the court."
>
> * * * * *
>
> "All we said then and all we say now is, that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the commissioner, the allowance may be used as the basis of an action against the United States * * *"

The *Bank of Greencastle's Case, supra,* was decided by the Court of Claims in the year 1879. In that case the Commissioner had allowed the claim for refund, but the Comptroller thereafter refused to pay it. The Court of Claims, at page 228, held that the Commissioner's decisions on claims for refund are in the nature of awards made by arbitrators. The Court, further at page 229, said:

> "But when the officer who is clothed with that power to adjust demands against the Government has allowed the claim and made his certificate to that effect, a new cause of action arises by implied contract or statute upon that certificate, into which the original demand is merged, and may be prosecuted to judgment in this court, if for want of an appropriation or other cause its payment is refused at the Treasury.

> These views have been sustained by the Supreme Court. (*Kaufman's Case*, 11 C. Cls. R. 659, affirmed on appeal, 96 U. S. 567; *Boughton's Case*, 12 C. Cls. R., 330; *Campbell's Case*, ib., 470; *Bradley's Case*, ib., 579; *De Celis's Case*, ib., 135; *McKnight's Case*, ib., 308; *Woolner's Case*, ib., 355; *Ramsay's Case*, ib., 367.)"

This Court, in the *Bonwit Teller* case, therefore merely followed the rule of law previously laid down in the above decisions.

The above rule of law to the effect that the allowance of the claim for refund by the Commissioner of Internal Revenue, raises an implied promise on the part of the United States to pay the amount actually due the claimant, which constitutes a new cause of action, is amply supported by the provisions of Sec. 281(a) of the Revenue Act of 1924 (Appendix, *infra*, p. 56) which became Sec. 284(a) of the Revenue Act of 1926 (Appendix, *infra*, p. 58).

This Sec. 284(a) provides that where there has been an overpayment of any income, war-profits, or excess-profits tax, the amount of such overpayment *shall* be credited against any income, war-profits, or excess-profits tax *then due* from the taxpayer, and the balance *shall* be refunded *immediately* to the taxpayer.

Under this section, upon the determination of the overpayment and the issuance of the certificate of overassessment as evidence thereof, the refund became *immediately* due and payable, and the taxpayer's cause of action for the recovery thereof thereupon accrued.

When a taxpayer files a claim for refund the Commissioner must audit the account and ascertain the taxpayer's true tax liability. This Court, in the case of *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 68, 70-71, said:

> "At once upon the filing of the claim for refund, there was an order for the complete examination of the business of the taxpayer, to the end that the net amount of its tax liability might be reported to the Bureau."

If upon this audit the Commissioner should find, as a fact, that there is no change in the taxpayer's tax liability as previously assessed, and hence there was no overpayment of tax, he disallows the claim and does not issue a certificate of overassessment. The taxpayer may, nevertheless, have this finding reviewed in court by a suit on the disallowed claim.

If, on the other hand, the Commissioner finds that there was an overpayment of tax by the taxpayer, he must certify this finding, which he proceeds to do by a certificate of overassessment. This finding that there was an overpayment constitutes an allowance of the claim, and this Court so ruled in the *Bonwit Teller* case, and such finding remains an allowance of the claim to the extent of the overpayment found, irrespective of any extraneous erroneous conclusion of fact or law that the Commissioner might have placed on the certificate.

If the function of the Commissioner be borne in mind, the distinction between an allowed claim and a disallowed claim will become obvious.

The Commissioner must audit the account to ascertain the true tax liability. If he finds that the amount previously assessed did not exceed the true tax liability, then he finds no overpayment and, naturally, does not issue a certificate of overassessment, but disallows the claim. The taxpayer may appeal to the courts, from this ruling, by suit upon the disallowed claim. In such suit the taxpayer has the burden of proving all the facts relating to his alleged true tax liability, so as to prove that there had been an overpayment of tax.

If, upon the audit, the Commissioner finds that the true tax liability was less than the amount of tax previously assessed, then he finds that there was an overpayment of tax and he issues his certificate of overassessment as evidence of this finding of fact. The taxpayer is thereupon entitled to the immediate refund of the overpayment. If the refund is not made, the taxpayer may sue upon the

allowed claim, and he need not prove any of the facts relating to his true tax liability, because the fact of the overpayment of tax has already been determined by the Commissioner.

When the Commissioner certifies the overpayment, he has no further choice, and is not called upon to exercise any discretion, or to make any promise or agreement regarding the refund. He transmits his certificate to the Treasury and states thereon the amount of the overpayment and the existence of any other tax *then due* from the taxpayer. The mandate of Sec. 284(a) thereupon comes into play. The certificate is merely evidence of the Commissioner's findings and upon this evidence and pursuant to the mandate of Sec. 284(a), the Treasury completes the credit and must refund the balance *immediately* to the taxpayer.

The overpayment may only be credited to any tax *then due*. This does not permit the overpayment to be credited to a barred deficiency, because a barred deficiency is outlawed and is not *then due*. Having found the fact of the overpayment of tax, the Commissioner has no authority under Sec. 284(a) to vitiate that finding by placing upon the certificate of overassessment a statement which is not true in fact.

Hence this Court, in the *Bonwit Teller* case held that a statement on the certificate of overassessment that part of the overpayment should be credited by the Treasury to a barred deficiency which was not *then due*, did not affect the certificate as an allowance of the claim for the full amount of the overpayment, and did not constitute a disallowance of the claim. It is respectfully submitted that all the decisions to the contrary are in error. A contention by the Commissioner that part of the overpayment should be credited against a deficiency for another year is merely a matter of defense, and does not destroy the taxpayer's cause of action. *United States* v. *Jaffray*, 306 U. S. 276, 282.

An erroneous statement, on the certificate of overassessment, that refund of part of the overpayment is barred by the statute of limitations, as in our case, likewise does not negative the allowance of the claim. *Wood* v. *United States*, 17 F. Supp. 521; *Clifton Mfg. Co.* v. *United States*, 19 F. Supp. 723; *Goodenough* v. *United States*, 19 F. Supp. 254; *Blue Jay Lumber Co.* v. *United States*, 27 F. Supp. 707. It is again respectfully submitted that all decisions to the contrary are in error.

The Commissioner having made his findings of fact as to the existence of the overassessment, the overpayment became *immediately* due and payable to the taxpayer pursuant to the mandate of Sec. 284(a), and hence, at that time, the cause of action arose in favor of the taxpayer, as held by this Court in the *Bonwit Teller* case. This was a new cause of action arising under the provisions of Sec. 284(a), and was not the cause of action limited by Sec. 3226 R. S. This new cause of action therefore comes within the general limitation of the Tucker Act, and suit thereon may be commenced within six years after the cause of action arose, as held by this Court in the *Bonwit Teller* case.

The relevant facts in our case are the same as the facts in the *Bonwit Teller* case. The respondent's claim for refund was not disallowed, but was allowed. The facts in our case are possibly even stronger, because the portion of the overassessment, not refunded, was withheld by reason of a mistaken ruling that payment thereof was barred, while in the *Bonwit Teller* case the unpaid amount was credited to a barred deficiency of tax for another year.

In our case the certificate of overassessment was issued in October 1929 (R. 4, 19, 26) and the cause of action arose on that date.

The suit was commenced on March 7, 1932 (R. 1), less than six years after the cause of action accrued and was therefore timely under the rule of the *Bonwit Teller* case, and under the provisions of the Tucker Act (U. S. C., Title 28, Sec. 41, par. 20).

Although the *Bonwit Teller* case was brought in the Court of Claims, the same statute of limitations for the commencement of suit must apply in the District Court. Both limitation provisions come down from the Second subdivision of the first section of the Tucker Act (Appendix, *infra*, p. 62),

Mr. Justice Black speaking for this Court in the case of *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, very aptly said at page 570:

> "The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitation applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims."

And at page 571 of said decision this Court said:

> "The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. We find no support in the background or objective of the Act for a construction under which a claimant's rights would be preserved by filing a petition in the Court of Claims, but would be lost—without additional action—in the District Court."

Under the above decision of this Court, in the case of *Bates Mfg. Co.* v. *United States, supra*, this Court held that uniformity of opportunity for recovery must be afforded in the two forums to preserve "the symmetry of the plan."

III.

The District Court Had Jurisdiction of this Suit.

The Tucker Act, enacted March 3, 1887, c. 359, 24 Stat. 505 (Appendix, *infra*, p. 62) is often cited as though it prescribed only the jurisdiction of the district courts in suits against the United States, and as though it is synonymous with U. S. C., Title 28, Sec. 41, par. 20, which now prescribes said jurisdiction. This is not so.

The Tucker Act was entitled "An act to provide for the bringing of suits against the Government of the United States," and it primarily enlarged the then existing jurisdiction of the Court of Claims, and incidentally gave concurrent jurisdiction, with the Court of Claims, to the district courts, if the amount of the claim did not exceed $1,000, and to the circuit courts, if the amount of the claim exceeded $1,000 but did not exceed $10,000.

The Act in the First section, gave the Court of Claims jurisdiction of "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, * * *", and fixed the statute of limitations for commencing suit against the Government of the United States, at six years after the right accrued. In Sec. 2 said Act gave the district courts and circuit courts "concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section", within the limits, above mentioned, as to the amount of the claim.

The Judicial Code, enacted March 3, 1911, c. 231, 36 Stat. 1087, abolished the circuit courts, by Sec. 289, and split the provisions of the Tucker Act into several separate sections. The jurisdiction of Court of Claims was embodied in Sec. 145 (Appendix, *infra*, p. 63) in practically

the identical language of the Tucker Act, and the statute of limitations for suits in the Court of Claims was embodied in Sec. 156 (Appendix, *infra*, p. 63). The jurisdiction of the district courts was increased to $10,000, and was embodied in Sec. 24 par. 20 (Appendix, *infra*, p. 64) in substantially the same language as Sec. 145, and the statute of limitations for suits in the district courts was included in the same Sec. 24, par. 20.

The provisions of the Tucker Act, relating to the jurisdiction of the district courts, embodied in Sec. 24, par. 20 of the Judicial Code, were further amended on November 23, 1921 by Sec. 1310 of the Revenue Act of 1921, c. 136, 42 Stat. 227. This amendment enlarged the jurisdiction of the district courts by inserting, in Sec. 24, par. 20 of the Judicial Code, a clause which removed the limit of $10,000 in the specific type of suit for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, if the collector of internal revenue by whom such tax was collected is dead when the suit is commenced. *Schwab* v. *United States*, 17 F. (2d) 34.

By Act of February 24, 1925, c. 309, 43 Stat. 972, said section of the Judicial Code was further amended by inserting after the words "if the collector * * * is dead" the words "or is not in office."

These amendments completed the present language of Sec. 24, par. 20, of the Judicial Code, now U. S. C., Title 28, Sec. 41, par. 20 (Appendix, *infra*, p. 65) which is still commonly called the Tucker Act, and these amendments did not give the district courts any independent jurisdiction of suits against the Government of the United States, but still provided that the jurisdiction was concurrent with the Court of Claims.

The jurisdiction of the Court of Claims, and the statute of limitations for suits in that Court, contained in Secs. 145 and 156 of the Judicial Code are now Secs. 250 and 262 of U. S. C. Title 28 (Appendix, *infra*, p. 64).

Prior to the enactment of the Tucker Act, the jurisdiction of the Court of Claims was prescribed by Sec. 1059, Revised Statutes (Appendix, *infra*, p. 61) which was similar to the above opening words of section First of the Tucker Act except that it did not include claims founded upon "the Constitution of the United States." The six year statute of limitations for commencement of suits in the Court of Claims was then contained in Sec. 1069, Revised Statutes (Appendix, *infra*, p. 61).

Some courts have suggested that the specific type of suit, of which the district courts have unlimited concurrent jurisdiction, which is defined by the above amendments as "any suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected" does not come within any of the general types of suit included in the statute before amendment. But the jurisdiction of the district courts over this specific type of suit is concurrent with the Court of Claims, and Sec. 145 of the Judicial Code does not contain language identical to the above. Therefore this type of suit must be included in the general type of "claims founded upon * * * any law of Congress, * * * or upon any contract, express or implied, with the Government of the United States * * *".

Suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected" are the same as suits for the recovery of refunds of overpayment of taxes.

Mr. Chief Justice Hughes, during his tenure as an Associate Justice of this Court in 1915, speaking for this Court in *United States* v. *Hvoslef*, 237 U. S. 1, said:

> "The various Acts of Congress for refunding of taxes erroneously collected arising out of war revenue Acts of 1898 created claims founded upon a 'law of Congress' within the meaning of the Tucker Act."

Our case was brought for a refund of a tax erroneously collected. It was based upon the implied promise of the

United States to make the refund, contained in a "law of Congress"—Sec. 284(a) of the Revenue Act of 1926—The implied promise, contained in this law, became effective upon the allowance of the claim for refund by the Commissioner of Internal Revenue, through his finding of fact that an overpayment had been made, as evidenced by the certificate of overassessment issued by him.

The Commissioner's finding that an overpayment had been made and his issuance of the certificate of overassessment as evidence of his finding brought into operation the mandate of Sec. 284(a) that the overpayment be refunded immediately to the taxpayer, which gave rise to the cause of action under the rule laid down by this Court in the *Bonwit Teller* case, and the cases therein cited.

This cause of action was not autogenous. It did not arise spontaneously. It arose upon a claim founded upon a "law of Congress"—a section of an Internal Revenue Act—. It was a cause of action for the recovery of an overpayment of tax.

It is inconceivable how this cause of action can be considered anything but an action for the recovery of an internal-revenue tax erroneously collected within the meaning of those words as used in the amendments to Sec. 24, par. 20, of the Judicial Code. It is the same type of cause of action, on an allowed claim, as was considered by this Court in the *Bonwit Teller* case, and this Court in the opening words of its decision in that case said:

> "This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate, No. 990,988 issued to plaintiff May 12, 1927."

It is interesting to note that the petitioner, in opening the Summary of Argument, at page 6 of its brief herein, cannot avoid saying "This is a suit to recover income taxes for the year 1920."

The Collector who collected this tax being dead or not in office when this suit was commenced, this suit is within the specific type of which the district courts have full, unlimited, concurrent jurisdiction with the Court of Claims, under the amendments to the Tucker Act.

The jurisdiction of the district courts over this type of suit has been sustained by this Court in the cases of *United States* v. *Bertelsen & Petersen Mfg. Co.*, 306 U. S. 276, and *United States* v. *Jaffray*, 306 U. S. 276, which were jointly decided. Those suits were brought for the recovery of overpayments of tax found by the Commissioner of Internal Revenue, and evidenced by certificates of overassessment issued by him, but erroneously credited by him against barred deficiencies for other years. To this extent the facts in those cases were substantially the same as the facts in the case of *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. In each of these three cases a claim for refund had been filed, and the Commissioner of Internal Revenue had found that the tax had been overpaid, and evidenced his findings by issuing a certificate of overassessment showing the amount of the overpayment. In each case the Commissioner had erroneously credited a portion of the overpayment against a barred deficiency for another year, a tax which was not *then due*. In each case the taxpayer sued to recover the amount of the overpayment which had thus been erroneously credited against the barred deficiency for another year.

This Court, in the *Bertelsen & Petersen Mfg. Co.* and *Jaffray* cases sustained the jurisdiction of the District Court under the Tucker Act, as amended, and held that the cause fell "within the very words of the amendment" of the Tucker Act.

It will be remembered that the *Bonwit Teller* case was commenced more than five years after the tax was paid and more than two years after the issuance of the certificate of overassessment and that the Government therefore con-

tended that the action was commenced too late under Sec. 3226 R. S. In the *Bertelsen & Petersen Eng. Co.* case the certificate of overassessment was issued on October 11, 1927, and the suit was commenced on September 19, 1929, or less than two years after the issuance of the certificate of overassessment. In the *Jaffray* case the certificate of overassessment was issued on August 16, 1933, and the suit was commenced on August 29, 1934, likewise less than two years after the issuance of certificate of overassessment.

Because of the fact that in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases, the actions were commenced less than two years after the issuance of the certificate of overassessment, the timeliness of the commencement of the suit was not involved, and neither of the parties in these two suits, on the appeal to this Court, cited the *Bonwit Teller* case in its brief, and this Court in its decision, did not consider the *Bonwit Teller* case, or the older cases there cited, and did not refer to the rule, therein laid down, that the certificate of overassessment constituted an allowance of the claim.

The question of the timeliness of the commencement of the suits not being involved, it made no material difference whether the claim was considered allowed or disallowed. In either respect the action was for the recovery of an internal revenue tax erroneously collected by a collector who was dead or not in office, and the District Court had jurisdiction. This Court, in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases stated that the crediting of a part of the overpayment against a barred deficiency for another year, constituted a disallowance of the claim for refund, but it is respectfully submitted that this decision is not to be considered as overruling the decision of this Court in the *Bonwit Teller* case, because the timeliness of the commencement of the action was not involved in the *Bertelsen & Petersen Eng. Co.* and *Jaffray* cases.

The petitioner contended, in the Court below, and now contends, that the District Court had no jurisdiction under the Tucker Act, because our case is an action upon an account stated. The petitioner, in subdivision 4 of Point I, on pages 20 to 27, of its brief herein, tries to uphold the dissenting opinion of Judge Biggs upon the first appeal herein to the Court below, and cites the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Moses* v. *United States*, 61 F. (2d) 791, which was relied upon by Judge Biggs in said dissenting opinion

Judge Biggs, in his said dissenting opinion in our case, upon the first appeal to the Court below (R. 32), cited the *Moses* case and said that a suit on an account stated cannot be brought against a collector, since the collector has no power to state an account between the United States and a taxpayer. There is some confusion in other courts on the proposition of a tax action upon an account stated. This is largely due to an improper reading of the decisions of this Court in the cases of *United States* v. *Kaufman*, 96 U. S. 567, *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, *Bank of Greencastle's Case*, 15 Ct. Cl. 225, *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258.

An account stated is a form of simple contract in which two contracting parties have agreed upon the balance due from the debtor to the creditor, and the debtor has agreed to pay this balance, and the creditor has agreed to accept it in full payment of the indebtedness. An account stated requires the presence of two parties who are able to enter into a contract, and a full meeting of their minds upon the terms of the contract.

In the *Kaufman* case this Court, at page 569 said that the allowance of a claim by the Commissioner of Internal Revenue raised *an implied promise on the part of the United States* to pay the amount due the claimant, and on page 570 said that such allowance is equivalent to an account stated between private parties.

This Court in the *Real Estate Savings Bank* case, at page 733 likewise said that the allowance of a claim by the Commissioner was equivalent to an account stated between private parties because it raised *an implied promise on the part of the United States* to pay what might actually be due the claimant.

In the *Bank of Greencastle's* case, at page 229, the Court of Claims said that when the claim is allowed and the certificate made, *a new cause of action arises by implied contract or statute* upon that certificate.

This Court in the *Bonwit Teller* case said that plaintiff sued upon the issue and delivery of the Commissioner's certificate and also sued upon an account stated, but this Court did not directly state that the action was upon an account stated. This Court merely said that upon delivery of the certificate to the plaintiff, there arose the cause of action upon which that suit was brought.

In any event, the basis of the suit is the *implied promise of the United States, contained in the statute* which directs the immediate payment of the refund after the Commissioner finds the fact of the overpayment. Even though this implied promise be considered equivalent to an account stated between private parties, it is still founded upon a "law of Congress" or a "contract, * * * implied, with the Government of the United States," within the meaning of the Tucker Act. It also remains a suit for a refund of an overpayment of tax, ~~or for the~~ recovery of an internal-revenue tax erroneously collected, within the meaning of the amendments to the Tucker Act.

As stated in the *Bonwit Teller* case, and the cases therein cited, the allowance of the claim gives rise to a new cause of action. But an account stated, of itself, cannot and does not create the liability. The account stated only determines the amount of the indebtedness where the liability already existed. *In re Merz* (C. C. A. 2), 45 F. (2d) 558; *Stocking* v. *Seed Filter & Mfg. Co., Inc.*, 175 App. Div. 812,

162 N. Y. Supp. 451; *Burroughs Adding Mach. Co.* v. *Hosack,* 224 App. Div. 583, 231 N. Y. Supp. 457. The account stated is an agreement between the parties regarding the amount due on past transactions. *Rodkinson* v. *Haecker,* 248 N. Y. 480, 485. The previous liability or the past transactions form the subject matter of the account stated. In a so-called "account stated" upon a tax liability, the certificate of overassessment fixes the amount of the overpayment of tax, but the liability of the Government for the erroneous collection of the overpayment still remains the subject matter of the account stated, and the district courts have jurisdiction thereof, under the Tucker Act. It was so held by the Circuit Court of Appeals for the Seventh Circuit, in the case of *C. T. C. Investment Co.* v. *United States,* 108 F. (2d) 383, where that Court, at page 386, said:

> "An admission of an indebtedness and an agreement to pay the amount due does not necessarily eliminate the tort claim out of which admission and agreement grew."

Although the allowance of the claim and the resulting account stated give rise to a new cause of action, the basis of the action is still the previous liability, or the tax which was erroneously collected, the amount of which was fixed by the account stated, and the district courts have jurisdiction of the action, under the Tucker Act, if the Collector by whom the tax was collected is dead or not in office.

The above quoted case of *C. T. C. Investment Co.* v. *United States,* 108 F. (2d) 383, likewise involved a certificate of overassessment and the District Court dismissed the complaint for lack of jurisdiction under the Tucker Act upon the ground that the claim was based on an implied promise of the Government evidenced by the certificate of overassessment. The Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, and

after quoting the text of the Tucker Act, the Court, at page 385 said:

> "Its [the Government's] argument is that the complaint sets forth an agreement arising out of an implied agreement to pay, which in turn is predicated on the Government's certificate of over-assessment. The heart of the argument lies in the assertion that the issuance of the Government's certificate of over-assessment crystallized the taxpayer's claim into a new cause of action—a cause of action based on contract. Bonwit Teller & Co. v. U. S., 283, U. S. 258, 51 S. Ct. 395, 75 L. Ed. 1018 is relied on. In short, plaintiff's cause of action is not predicated upon a claim of taxes illegally assessed and collected by the Government, which is the only basis for the District Court's jurisdiction where the amount exceeds $10,000., but is one arising out of the Government's implied promise to pay.
>
> "We are of a different opinion. In other words, we are satisfied that Section 41(20) Title 28 U. S. C. A. invested the District Court with jurisdiction of plaintiff's cause of action."

The Court further, on page 386, said:

> "We are not convinced that a fair construction of the statute did not give to plaintiff the right upon the facts here disclosed, to sue on either theory—tort or contract—in the District Court, even though its claim exceeded $10,000. For the amendment to this Act represented by the words beginning with 'and of any suit' and continuing to the end of the section dealt with claims of a particular kind, to-wit, 'for the recovery of any internal revenue tax alleged to be erroneously or illegally assessed or collected.' The amendment having made a particular exception and having covered specific claims,—claims which arise out of overpayment of taxes, it should be construed to cover any claims of the class designated. The amendment was specific; it included 'any' claim for the overpayment of taxes. It therefore included those termed *ex contractu*, as well as claims *ex delicto—Generalia specialibus non derogant.*"

The decision of the Circuit Court of Appeals for the Second Circuit, in the case of *Moses* v. *United States,* 61 F. (2d) 791, is not sound law, and is in direct conflict with the later decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *C. T. C. Investment Co.* v. *United States, supra,* and with the later decision of the Court below in our case.

The decision of the Circuit Court of Appeals for the Second Circuit, in the *Moses* case, was cited by the petitioner herein, in its brief and upon its argument in the Court below, but apparently carried no weight with that Court, for it decided that this suit was for the recovery of a tax erroneously assessed and collected, and that the Collectors to whom the tax had been paid were no longer in office, and that the District Court therefore had jurisdiction (R. 46).

The said decision of the Circuit Court of Appeals for the Second Circuit, in the *Moses* case, was also cited and relied upon by the Government in case of *C. T. C. Investment Co.* v. *United States, supra,* before the Circuit Court of Appeals for the Seventh Circuit, but that Court also refused to follow it and sustained the jurisdiction of the District Court.

In this Court, in the case of *United States* v. *Bertelsen & Petersen Eng. Co.,* 306 U. S. 276, the Government also argued that the District Court had no jurisdiction and supported this argument by the *Moses* case, but this Court held that the action was properly brought in the District Court under the Tucker Act.

The Circuit Court of Appeals for the Second Circuit, in the case of *Gans Steamship Line* v. *United States,* 105 F. (2d) 955, itself seemed to deviate from its decision in the *Moses* case. The facts in the *Gans Steamship Line* case are set forth in the opinion of the District Court reported in 26 F. Supp. 976. The action was brought to recover an overpayment of 1917 tax fixed in amount by a

certificate of overassessment and credited against an allegedly barred deficiency for 1919. The Circuit Court of Appeals for the Second Circuit upheld the jurisdiction of the District Court, and said, at page 956:

> "This action seeks recovery of taxes illegally collected for the year 1917—not 1919 (the year to which the 1917 overpayment was credited). Hence the suit might have been brought against the collector to whom payment was made; and he being out of office, it may be brought against the United States pursuant to paragraph 20 of section 24 of the Judicial Code, as amended, 28 U. S. C. A. §41 (20). United States v. Bertelsen & Petersen Engineering Co., 306 U. S. , 59 S. Ct. 541, 83 L. Ed. ."

The further facts, in the *Gans Steamship Line* case, were that the final payment of the 1917 tax was made on February 21, 1924, the certificate of overassessment was issued on October 28, 1925, and the action was commenced, in the District Court, on January 2, 1936, or more than eleven years after the tax was paid and more than ten years after the certificate of overassessment was issued. The suit was therefore commenced too late both under the provisions of Sec. 3226 R. S. and under the Tucker Act. Upon these facts alone, judgment should have been rendered in favor of the Government, because the action was not timely commenced under any theory.

Instead of directly so deciding, the Circuit Court of Appeals for the Second Circuit erroneously proceeded to designate as dictum the rule laid down by this Court in the *Bonwit Teller* case, that the crediting of an overpayment against a barred deficiency for another year is not a disallowance of the claim for refund.

This erroneous statement, that this rule laid down by this Court, in the *Bonwit Teller* case, was dictum, was based by the Circuit Court of Appeals for the Second Circuit upon the erroneous reference to the *Bonwit Teller*

case contained in the decision of *John T. Jelke Co.* v. *Smietanka,* 86 F. (2d) 470. That latter case, at page 473, erroneously stated that this Court's conclusion, in the *Bonwit Teller* case, was that a suit based upon determination and certification by the Commissioner that the taxpayer was entitled to a refund of a specific amount, is not barred by Sec. 3226 R. S. but rather only by a lapse of five years from the payment of the tax.

This Court made no such statement, in the *Bonwit Teller* case, but, on the contrary, expressly held that the passing of five years after the payment of the tax did not bar the suit, and that the suit was timely commenced six years after the date of the delivery of the certificate of overassessment to the plaintiff.

The Circuit Court of Appeals for the Second Circuit, in the *Moses* case, also claimed that the District Court has no jurisdiction of a suit such as the *Bonwit Teller* case, because the liability rests upon an implied promise to pay, and a Collector cannot be sued on such implied promise for he can neither allow a refund nor draw money from the Treasury to pay it. That Court overlooked the fact that the Collector likewise cannot disallow a claim for refund, but, nevertheless, can be personally sued for the erroneous collection of the tax, after the disallowance of the claim. After the issuance of a certificate of overassessment by the Commissioner, the Collector can still be personally sued for the erroneous collection of the tax in spite of the implied promise on the part of the United States to repay it.

The *Moses* case quoted and relied on *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97, which erroneously denied jurisdiction to the district courts on the ground that the Collector had nothing to do with issuing the certificate of overassessment and was not privy to the promise. There is no such requirement in the Tucker Act.

These and several other similar decisions of the lower courts fall into the error of misreading the conditions which define the specific type of suit against the United States of

which the district courts, under the amendments to the Tucker Act, have unlimited concurrent jurisdiction with the Court of Claims. These two conditions are (1) that the suit must be for the recovery of any internal-revenue tax erroneously collected, and (2) that the Collector by whom the tax was collected should be dead or not in office.

There can be no question that prior to the amendments to the Tucker Act, the district courts had and still have concurrent jurisdiction with the Court of Claims of every type of suit against the United States, including a suit upon an implied promise of the United States to refund an overpayment of tax, provided the suit in the District Court was for not more than $10,000. The amendments removed this limit in *any* suit for the recovery of *any* internal-revenue tax erroneously collected, if the above two conditions existed. A suit for the recovery of an internal-revenue tax erroneously collected is a suit for refund, and the United States could not be sued for a refund unless some "law of Congress" contained an implied promise to refund the overpayment of tax.

Those decisions which deny, to the district courts, jurisdiction of suits for the recovery of a refund of tax, based on an implied promise of the United States to repay the amount rightfully due the claimant, attempt to reason that such suit is based on contract, and that the 1921 amendment to the Tucker Act, which permitted suits to recover taxes erroneously collected, only covers suits based on tort. But Congress, in the Tucker Act, did not intend that the United States might be sued, in the Court of Claims, on a tort cause. The Tucker Act permits suits on claims founded upon the Constitution, any law of Congress, executive regulation, contract, express or implied, or for damages *in cases not sounding in tort.*

A suit against a collector for an erroneous collection of tax is a common law suit based on his tort. A suit against the United States for the recovery of a tax erroneously collected is a suit for the refund of the overpayment of tax,

and is not based on the tort of the collector, but must always be based on the implied promise of the United States to make the refund, contained in a "law of Congress"—an internal revenue act—.

The petitioner, the *Moses,* and *Arthur C. Harvey Co.* v. *Malley,* and other similar cases completely lose sight of the purpose of the amendments to the Tucker Act. They look for a concurrence of jurisdiction within the district courts between suits against the United States and personal suits against collectors of internal revenue. No such concurrence was within the contemplation or intent of the amendments to the Tucker Act. The Court of Claims has no jurisdiction of personal suits against a collector of internal revenue, and the United States did not permit itself to be sued in the district courts in a type of suit of which the Court of Claims did not have concurrent jurisdiction.

The entire theory that a suit against the United States in the district courts for the recovery of an internal revenue tax erroneously collected, must be a type of suit which could be brought against a collector of internal revenue, of which the Court of Claims has no jurisdiction, is abhorrent to what Mr. Justice Black, in the case of *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 570, called "the symmetry of the plan."

As a further argument against the *Moses* and *Arthur C. Harvey Co.* v. *Malley* cases, it may be pointed out that the Commissioner of Internal Revenue is likewise not privy to the implied promise on the part of the United States to pay the amount due the taxpayer. The Commissioner has only the right to make the finding of fact as to the existence of the overpayment, but has no authority, by himself, to make a contract with a taxpayer with reference to a tax liability, whether the contract be an account stated or in any other form. Only with the advice and consent of the Secretary of the Treasury, can the Commissioner make a binding contract with reference to a tax liability.

It was so held by this Court, in the case of *Botany Worsted Mills* v. *United States,* 278 U. S. 282. This Court there held that the Commissioner has no right to enter into any agreement with the taxpayer as to the taxpayer's tax liability, except in conformity with Sec. 3229 R. S. or Sec. 1106(b) of the Revenue Act of 1926. This statutory permission provides that the Commissioner of Internal Revenue may enter into a closing agreement with the advice and consent of the Secretary of the Treasury, and this Court held, in the *Botany Worsted Mills* case that an agreement by the Commissioner of Internal Revenue is not valid unless so made with the advice and consent of the Secretary of the Treasury. Certificates of overassessment, are not made with the advice and consent of the Secretary of the Treasury, and therefore cannot be considered contracts made by the Commissioner of Internal Revenue. They merely constitute findings of fact made by the Commissioner, which under the mandate of the statute—Sec. 284(a) of the Revenue Act of 1926—give rise to an implied promise by the United States to refund the overpayment immediately, and thereby form the basis of the cause of action. The Commissioner is not a party to the implied promise or contract which is considered equivalent to an account stated between private parties. The parties to the implied account stated are the United States and the taxpayer.

Our case is for the recovery of an internal revenue tax alleged to have been erroneously collected, as to which the United States admitted liability and which it promised, by statute, to repay, and there is no justification, under the Tucker Act, for endowing the Collector, who collected it, with any undue importance, for the purpose of vesting unlimited jurisdiction in the District Court, except that he must be dead or not in office.

This Court, in the case of *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, held that when a tax has been duly assessed by the Commissioner of Internal Revenue, the Collector is under a ministerial duty to proceed to collect it. There

is nothing left to his discretion. His duty being imperative, he is protected by the command of his superior from liability for trespass. Along with the duty, there went a pledge of indemnity by the Government itself. His function, in the repayment of an internal revenue tax which had been erroneously collected, is inconsequential. At pages 382, 383, this Court said:

> "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomolous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. Philadelphia v. Collector (Philadelphia v. Diehl), supra (5 Wall. p. 731, 18 L. ed. 606). There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

Our case is clearly within that special type of suit of which the district courts have unlimited concurrent jurisdiction with the Court of Claims, for it is a suit based on a claim founded upon a "law of Congress"—Sec. 284(a) of the Internal Revenue Act of 1926—for the recovery of an internal revenue tax alleged to have been erroneously collected, and the collector of internal revenue by whom the tax was collected was dead or not in office when this suit was commenced. As said by this Court in the case of *United States* v. *Bertelsen & Petersen Eng. Co.*, 306 U. S. 276, our cause "falls within the very words of the amendment of the Tucker Act."

The United States, as a sovereign, may only be sued in such manner as it may permit. Under the Tucker Act it permitted itself to be sued, in a District Court, for the recovery of an erroneously collected internal revenue tax, without limit as to amount, if the collector of internal revenue by whom such tax was collected is dead or out of office. Such authority to sue the United States must be liberally construed. *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *Emory, Bird, Thayer Realty Co.*, 237 U. S. 28, 32.

IV.

Other Cases Relied on by Petitioner Distinguished or Discussed.

Some of the cases cited by petitioner have been cited or discussed in previous portions of this brief. To preserve the continuity of the argument, a number of petitioner's citations were omitted, and some of them will be taken up here.

On page 12 of its brief petitioner cites *United States* v. *Michel*, 282 U. S. 656. That case has no bearing whatever on our case. The suit was not upon an allowed claim. No certificate of overassessment had been issued by the Commissioner. The claim had been rejected, but the Commissioner had failed to give the taxpayer notice of rejection until more than two years after the actual rejection. The suit was commenced within two years after the taxpayer received notice of the rejection, but much more than two years after the rejection of the claim. This Court held that the failure to give notice of rejection did not extend the time to commence suit, and that the suit was not timely commenced within them two years after the rejection of the claim.

In subdivision 2 of Point I on pages 12 to 14 of its brief, the petitioner argues that the decision, upon the first ap-

peal herein to the Court below, may have been the law of the case in the Court below, but is not the law of the case in this Court. Respondent does not dispute this argument.

In subdivision 3 of Point I on pages 14 to 20 of its brief, the petitioner disagrees with the reasoning in the prevailing opinion upon the first appeal to the Court below. Respondent, in its brief and argument on that appeal, did not urge the reasons stated in the prevailing opinion, and does not urge those reasons in its present argument before this Court, but contends that the decision of the Court below, upon the first appeal herein, arrived at a sound conclusion.

Respondent likewise disagrees with the effect of some of the cases cited in that subdivision of petitioner's brief. A discussion of some of these citations will suffice.

Stearns Co. v. *United States,* 291 U. S. 54, cited on page 18, did not involve a question of an allowed claim. On the contrary, this Court held there that the taxpayer had requested that a deficiency for another year be held open by the Commissioner and that the overassessment be credited to that deficiency.

Daube v. *United States,* 289 U. S. 367, cited on page 18, was distinguished in its decision from the *Bonwit Teller* case. In the *Daube* case, the Commissioner changed his finding before he delivered a certificate of overassessment. On pages 21-22 and 24-25 of its brief herein, the petition quotes two extracts from the opinion of Mr. Justice Cardozo in the *Daube* case. The quotation on pages 21-22 shows that Mr. Justice Cardozo approved the *Bonwit Teller* case, and in citing it said "The statement of an account gives rise to a new cause of action with a new term of limitation." In the quotation on pages 24-25, Mr. Justice Cardozo did not say that the *Bonwit Teller* case went too far, but said that "in the *Bonwit Teller* case a specific

limitation applicable to claims for the recovery of taxes is set aside and superceded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid." Mr. Justice Cardozo conceded that in the *Bonwit Teller* case the inference of an agreement was sustained by the issuance of a certificate of overassessment. In the *Daube* case, as explained by Mr. Justice Cardozo, the Commissioner had placed the overassessment on a schedule, but had cancelled it before delivering a certificate of overassessment, and never delivered the certificate to the taxpayer, and to this type of case in which no certificate of overassessment was ever delivered, Mr. Justice Cardozo said, the ruling of the *Bonwit Teller* case should not be extended "through an enlargement of the concept of an account stated by latitudinarian construction."

United States v. *Chicago Golf Club,* 84 F. (2d) 914; *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068, and *Phoenix State Bank & Trust Co.* v. *Bitgood,* 28 F. (2d) 899, cited on page 18 of petitioner's brief, were all cases which did not involve a certificate of overassessment and therefore have no bearing on the rule in the *Bonwit Teller* case.

On page 23 of its brief, petitioner relies on the case of *Marks* v. *United States,* 98 F. (2d) 564 upon the proposition that a certificate of overassessment, which contains a statement that part of the overpayment was barred by the statute of limitations, will not support a suit on an account stated. This case, decided by the Circuit Court of Appeals for the Second Circuit, is in conflict with the four Court of Claims decisions in the cases of *Wood* v. *United States,* 17 F. Supp. 521; *Clifton Mfg. Co.* v. *United States,* 19 F. Supp. 723; *Goodenough* v. *United States,* 19 F. Supp. 254, and *Blue Jay Lumber Co.* v. *United States,* 27 F. Supp. 707. It is respectfully submitted that the Court of Claims decisions are correct, and that the *Marks* case is in error.

On page 26 of its brief, petitioner relies on *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. This case is entirely irrelevant. It involved an action brought for a refund of a tax paid by credit of an overassessment for another year. The suit was for the year to which the credit was applied and not the year out of which the credit arose. In that case the District Court had no jurisdiction because the taxpayer could not sustain the statutory jurisdictional allegation that the Collector by whom the tax was collected was dead or not in office. No Collector had ever collected that tax. The tax was not paid in cash by the taxpayer to the Collector but was paid by credit of an overassessment for another year. The credit was collected directly by the Commissioner from the Treasury, and did not pass through the hands of the Collector. The *Lowe Bros. Co.* case was distinguished by this Court in *United States* v. *Bertelsen & Petersen Eng. Co.,* 306 U. S. 276.

The distinction between the *Lowe Bros. Co.* case, and a case in which the tax had been collected by a Collector was even recognized by the Circuit Court of Appeals for the Second Circuit, in the case of *Gans Steamship Line* v. *United States,* 105 F. (2d) 955, 956, where that Court said:

> "This action seeks recovery of taxes illegally collected for the year 1917—not 1919 (the year to which the 1917 overpayments was credited)."

The *Otis Elevator Co.* v. *United States,* 18 F. Supp. 87, cited by petitioner on page 27 of its brief, was decided by the District Court for the Southern District of New York, and followed the decision of its Circuit Court in the case of *Moses* v. *United States,* 61 F. (2d) 791, which has been previously fully discussed in this brief.

Dubiske v. *United States,* 98 F. (2d) 361, cited by petitioner on page 34 of its brief herein, is not applicable to our case. In the *Dubiske* case, the Court held that the tax-

payer did not file a waiver on or before June 15, 1925, and therefore did not come within the provisions of Sec. 284(g) of the Revenue Act of 1926. The Court also said that it was necessary to file a claim for refund before April 1, 1926. This statement did not necessarily exclude the right to file the claim for refund within four years after the tax was paid, because that issue was not before the Court, as the decision hinged on the taxpayer's failure to file a waiver. If that Court intended to follow the rule of *Weinberg* v. *United States,* 25 F. Supp. 83, to the effect that the April 1st date is the only effective branch of the alternative provided in Sec. 284(g), then it is respectfully submitted that the Court erred.

Brewer v. *Nat'l Life & Acc. Ins. Co.* (C. C. A. 6th) decided April 17, 1941 and printed in 414 C. C. H. par. 9399, is cited by petitioner on page 39 of its brief. This case is in direct conflict with the decision herein of the Court below. It held to the same effect as *Weinburg* v. *United States,* 25 F. Supp. 83, and also held that the rule of *Hills* v. *United States,* 50 F. (2d) 302 did not apply to refunds of income taxes. It is respectfully submitted that the *Brewer* case is not a well considered decision, and particularly errs in citing and relying on *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. The *Garbutt* case involved the validity of an amendment of a claim for refund and was in no way concerned with Sec. 284(g) of the Revenue Act of 1926, and was therefore not an authority for the decision in the *Brewer* case. In the *Garbutt Oil Co.* case the suit was brought to recover only the overpayment made on April 3, 1925, and no previous payments were under consideration.

V.

CONCLUSION.

The claim for refund herein was timely filed, and having been filed pursuant to the provisions of Sec. 284(g) of the Revenue Act of 1926 it permitted the recovery of the overpayment of 1920 tax paid by respondent in 1921. This suit was timely commenced within six years after the claim for refund was allowed, and the District Court had jurisdiction hereof.

The judgment of the Court below should be affirmed.

Respectfully submitted,

DONALD HORNE,
Attorney for Respondent.

ALEXANDER LEVENE,
of Counsel.

May, 1941.

Appendix.

Section 3228 of the Revised Statutes, as Amended by Sec. 1316 of the Revenue Act of 1921.

Sec. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:

"Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by Section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 314.

Section 252 of the Revenue Act of 1921.

REFUNDS

Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Rev-

enue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of Section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under Section 252, of the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 268.

Act of March 4, 1923, Amending Sec. 252 of the Revenue Act of 1921.

That Section 252 of the Revenue Act of 1921 is amended to read as follows:

"Sec. 252(a) * * * *Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid. * * *"

Chap. 276, 42 Stat. 1504, 1505.

Act of March 13, 1924, Amending Sec. 252 of the Revenue Act of 1921, as Amended.

That the second proviso of subdivision (a) of Section 252 of the Revenue Act of 1921 as amended by the Act entitled "An Act to amend the Revenue Act of 1921 in respect to credits and refunds," approved March 4, 1923, is amended to read as follows: "*Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within two years from the time the tax was paid."

Chap. 55, 43 Stat. 22.

Section 281 of the Revenue Act of 1924.

CREDITS AND REFUNDS.

Sec. 281(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed

such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

(f) * * * * *

Chap. 234, 43 Stat. 253, 301, 302.

Act of March 3, 1925, Amending Sec. 281(e) of the Revenue Act of 1924.

That subdivision (e) of Section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919, shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.

Chap. 435, 43 Stat. 1115.

Section 284 of the Revenue Act of 1926.

CREDITS AND REFUNDS

Sec. 284(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(c) • • • • •

(d) * * * * *

(e) * * * * *

(f) * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefore is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on

or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

(h) * * * * *

Chap. 27, 44 Stat. 9, 66-68.

Section 3226 of the Revised Statutes, as Amended by Sec. 1014, of the Revenue Act of 1924.

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to

which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Chap. 234, 43 Stat. 253.

Section 1059 of the Revised Statutes.

Sec. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Section 1069 of the Revised Statutes.

Sec. 1069. Every claim against the United States, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues. * * *

Tucker Act.

An act to provide for the bringing of suits against the Government of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: • • •

Second: All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

Sec. 2: That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claims exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury.

• • • • •

Sec. 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

Approved, March 3, 1887.

Chap. 359, 24 Stat. 505.

Judicial Code, Jurisdiction of and Statute of Limitations in Court of Claims.

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims (except for pensions) founded the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: * * *

Second: All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

* * * * *

Sec. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: * * *

Chap. 231, 36 Stat. 1087, 1136-7, 1139.

Judicial Code, Jurisdiction of District Courts.

Sec. 24. Original jurisdiction. The district court shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *; *And provided further,* That no suit against the Government of the United States shall be allowed under this section unless the same has been brought within six years after the right accrued for which the claim is made.

Chap. 231, 36 Stat. 1087, 1093.

United States Code of Laws—Jurisdiction of and Statute of Limitations in Court of Claims.

Sec. 250. (Judicial Code, section 145.) Jurisdiction. The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation

of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

(2) *Set-Offs.*—Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

* * * * *

Sec. 262. (Judicial Code, section 156.) Claims to be filed within six years. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. * * *

U. S. C., Title 28, Secs. 250, 262.

United States Code of Laws—Jurisdiction of District Courts.

Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

(20) *Suits against United States.*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or

implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

U. S. C., Title 28, Sec. 41, par. 20.

BLANK PAGE

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1940.

The United States of America, Petitioner, *vs.* The A. S. Kreider Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 26, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

In 1921, respondent filed its income tax return for 1920, disclosing tax liability of $52,481.97 which it paid in full. Thereafter, and prior to June 15, 1926, it executed a waiver extending until December 31, 1926, the time for audit and possible additional assessment of taxes. On July 26, 1926, respondent paid a deficiency assessment of $1,362.50. Almost three years later, on March 3, 1929, respondent filed a claim for refund of $53,844.47, the entire amount of taxes paid for 1920.

The Commissioner found that respondent had overpaid its 1920 taxes in the sum of $14,833.68. In October, 1929, he sent respondent a certificate of overassessment which noted that there had been an overpayment in that amount but that $13,471.18 was "barred by statute of limitations". Accompanying the certificate was a check for the difference, $1,362.50, which respondent apparently accepted. In thus computing the refund owing to respondent, the Commssioner assumed that subsections (b)(1), (b)(2), and (g) of § 284[1] of the Revenue Act of 1926 (44 Stat. 9, 66, 67) authorized him to remit only that part of the 1920 tax which was paid in 1926.

On March 7, 1932, respondent brought the present action in a United States District Court to recover the sum withheld. At the close of the trial, petitioner moved for judgment on the ground that the action was barred by § 1113(a) of the Revenue Act of 1926 (44 Stat. 9, 116). The District Court granted the motion and entered judgment for petitioner. 30 F. Supp. 722. The Circuit

[1] Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed [by specified Acts], the amount of such overpayment shall [subject to enumerated conditions] be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions . . . (g) of this section—

(1) No such credit or refund shall be allowed or made after . . . four years from the time the tax was paid in the case of a tax imposed by any

Court of Appeals reversed, one judge dissenting, holding that the general six-year limitation in § 24(20) of the Judicial Code [28 U. S. C. § 41(20)] rather than the limitations in § 1113(a) determined the timeliness of respondent's action. 97 F. (2d) 387.

The cause was returned to the District Court. Over the renewed contention of petitioner that the action was barred by § 1113(a), the District Court proceeded to the merits. It held, in effect, that § 284(b)(2) did not limit the refund sanctioned by § 284(g) to the portion of the tax paid within four years of respondent's claim, and entered judgment as prayed in the complaint. 30 F. Supp. 724. The Circuit Court of Appeals affirmed, accepting as the law of the case its earlier decision that the action was timely, despite petitioner's argument to the contrary. 117 F. (2d) 133. On April 14, 1941, we granted certiorari. — U. S. —.

Relying principally on *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, respondent maintains that its action was commenced well within the applicable period of limitation. Further, respondent contends that both courts below correctly refused to regard § 284(b)(2) as a limitation on the Commissioner's duty to make refunds under § 284(g). We find it unnecessary to examine the latter contention, for we are of opinion that respondent sued too late.

Insofar as material here, § 1113(a) provides: " . . . No [suit or proceeding for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected] shall be begun . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

Undoubtedly, respondent has failed to begin its action within either of the periods specified in § 1113(a). See *United States* v. *A. S. Kreider Co.*, 97 F. (2d) 387, 388. The suit was not instituted until March 7, 1932, although the last tax payment was made on July 26, 1926, and the claim for refund was disallowed in

---

prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the . . . four years . . . immediately preceding the filing of the claim. . . .

(g) . . . If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. . . .

October, 1929.[2] But as already stated, the court below held that the action was not barred because the Tucker Act (24 Stat. 505), later incorporated in § 24(20) of the Judicial Code, rather than § 1113(a) prescribed the period within which respondent was bound to bring suit. We view the statutes differently.

Section 24(20) gives the district courts jurisdiction concurrent with the court of claims of certain suits against the United States. To equate the right thus conferred to the existing right to sue in the court of claims (see 28 U. S. C. § 262), the statute provides: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment. See *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, 332-333.

Section 1113(a) is precisely that type of provision. Recognizing that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws, Congress allowed only five years from payment of the tax for the commencement of such actions, unless specified circumstances extended the period. That this specific provision is entirely consistent with the general provision in § 24(20) is plain. Indeed, the limitation in § 1113(a) has no meaning whatever unless the limitation in § 24(20) is construed not to govern proceedings for the recovery

[2] It should be noted that this action seeks recovery of money which was paid in 1921. We assume, so far as this decision is concerned, that the phrase "such tax" in the quoted language refers to the total tax for the year in question whenever determined and assessed; or stated differently, that "payment" within the meaning of this statute does not occur until the entire tax for 1920 is paid, including deficiency assessments made several years later. Compare Union Trust Co. v. United States, 70 F. (2d) 629.

We assume also that the Commissioner's refusal in 1929 to make the refund was a "disallowance" of respondent's claim. Compare Bonwit-Teller & Co. v. United States, 283 U. S. 258, 265, with United States v. Bertelsen & Petersen Engineering Co., 306 U. S. 276, 280.

of "internal-revenue tax alleged to have been erroneously or illegally assessed or collected".[3]

Bonwit-Teller & Co. v. *United States, supra,* does not remove the bar of § 1113(a) here. There we held under the peculiar facts disclosed that the taxpayer could evade the limitations of that section by grounding its action on a subsequent "account stated" rather than on the original, wrongful overassessment. But the instant case is plainly distinguishable, for, assuming that familiar doctrines of contracts furnish the test (*Daube* v. *United States,* 289 U. S. 367, 370), we are unable to find the requisites of an account stated in the transactions on which respondent relies.

To establish an account stated, respondent must show that a balance was struck "in such circumstances as to import a promise of payment on the one side and acceptance on the other". *R. H. Stearns Co.* v. *United States,* 291 U. S. 54, 65; see also, *Toland* v. *Sprague,* 12 Pet. 300, 325; *Nutt* v. *United States,* 125 U. S. 650. But plainly, "no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion." *R. H. Stearns Co.* v. *United States, supra.* In fact, a contrary inference is the only legitimate supposition respondent could make. At most, respondent could assume that the United States promised to pay $1,362.50; the check was there in fulfillment. Obviously, refusal to refund the balance did not and could not imply a promise to pay the amount withheld.

Acceptance by respondent, another essential of an account stated, is equally lacking. By accepting the check for $1,362.50 respondent agreed only to a partial account stated (compare *Sturm* v. *Boker,* 150 U. S. 312, 340), thereby converting that much of the statement into an account settled. The institution of this suit is ample proof that respondent never intended to accept the certificate in its entirety as a correct computation of the amount which it claimed was due.

We conclude that respondent's suit is barred by the limitations of § 1113(a). The judgment is reversed, and the cause is remanded with directions to dismiss the petition.

It is so ordered.

---

[3] Apparently the applicability of a specific limitation instead of the general Tucker Act limitation has not been challenged for 35 years. See Christie-Street Commission Co. *v.* United States, 136 Fed. 326. The specific limitation has been assumed to apply in numerous cases. See, e. g., United States *v.* Bertelsen & Petersen Engineering Co., 306 U. S. 276; Bates Mfg. Co. *v.* United States, 303 U. S. 567; R. H. Stearns Co. *v.* United States, 291 U. S. 54; Daube *v.* United States, 289 U. S. 367.